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No. 00-1194

IN THE

Supreme Court of the United States

SALLY CAMPBELL AND THE LOUISIANA CHRISTIAN COALITION,

Petitioners,

v.

ST. TAMMANY PARISH SCHOOL BOARD, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Petitioners herein have accurately summarized the procedural history of this case. However, Petitioners have either omitted or under-emphasized pertinent facts which were established in the record below. Petitioner, the Louisiana Christian Coalition, is a partisan political action group. Although it holds a non-profit tax status, its stated purpose is to "give Christians a voice in government again". Founded in 1989 as a local arm of the National Christian Coalition, whose chairman is Dr. Pat Robertson, its main objective is to persuade potential voters from a Christian point of view. To this end, Petitioner, Sally Campbell, and other members of the Louisiana Christian Coalition maintain religious beliefs that they should meet from time to time with other members of the community in order that they may express their biblical convictions regarding moral issues of the day, to pray about these issues, to sing religious songs and read relevant biblical passages.

On June 23, 1998, Petitioner, Sally Campbell, requested permission to use Respondent's facilities located at Mandeville Elementary School to host a "prayer meeting".[1] Specifically, in her letter seeking approval for the request, Campbell, the State Chairman of the Louisiana Christian Coalition stated:

> The Louisiana Christian Coalition is planning a ***prayer meeting*** which would conceivably be held the evening of either Thursday, August 6, 1998 or Thursday, August, 13, 1998, depending upon the

1. Although the Respondents herein include the St. Tammany Parish School Board, its Superintendent and individual members, we refer to the Respondents in the singular throughout this brief.

> availability of your facilities. ***At our prayer meeting, we plan to worship the Lord in prayer in music. We also plan to discuss family and political issues, pray about those issues, and seek to engage in religious and biblical instruction with regard to those issues.***

This request was again reiterated on July 14, 1998 at which time Campbell stated:

> As noted in my letter of June 23, 1998, the requested prayer meeting would involved ***praise*** and ***worship*** music, ***prayer***, and a discussion of relevant and topical issues which will be addressed from a Biblical viewpoint.

Campbell's request was denied by Respondent on the basis that Campbell's request violated Respondent's facilities use policy. Specifically, Respondent's facilities use policy prohibits ***outside*** organizations from conducting ***religious worship*** or ***instruction*** on Respondent's school premises. However, the policy allows outside groups to use school premises to discuss religious material or material which contains a religious viewpoint, and further allows the distribution of such material on school premises.

During discovery, Campbell admitted that it was the intent of Petitioners to use Respondent's facilities for praise and worship much like what would be conducted at church on Sunday morning. Consequently, there can be no dispute that Petitioners were seeking to utilize Respondent's facilities for religious worship services as found by the Fifth Circuit Court of Appeals. For reasons stated below, Respondent's facilities use policy barring these activities is constitutional. Accordingly, the Petition should be denied.

REASONS FOR DENYING THE WRIT

The sole question presented by the Petition is whether the United States Court of Appeals for the Fifth Circuit correctly held that Respondents' facilities use policy is constitutional. Because the Fifth Circuit Opinion does not contradict any earlier opinion of this Honorable Court, and because the Fifth Circuit's Opinion is not in conflict with any other opinions from the other United States Courts of Appeal, there is no good cause for this Court to grant Petitioners' Writ of Certiorari.

SUMMARY OF ARGUMENT

Respondent's facilities constitute a limited public forum from which certain subjects, including religious worship services and instruction, may be constitutionally excluded. Its policy is not only reasonable in light of the purposes served by the forum, but is also viewpoint neutral in that it excludes all outside, non-student groups, not simply Petitioners' organization, from using Respondent's facilities for religious worship or instruction. Contrary to Petitioners' arguments, the decision of the Fifth Circuit Court of Appeals does not conflict with the decisions of other circuits. Moreover, the Fifth Circuit concluded that Respondent's facilities were limited public fora, not non-public fora. The decision of the Fifth Circuit does not conflict with the decisions of this Court. Finally, Respondent's policy does not violate the Free Speech Clause, the Free Exercise Clause, the Establishment Clause or the Equal Protection Clause of the U.S. Constitution.

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE FIFTH CIRCUIT DOES NOT CONFLICT WITH DECISIONS OF OTHER CIRCUITS

Contrary to the position asserted by Petitioners herein, the Fifth Circuit's decision does not conflict with decisions from the other Circuits. A brief review of the cases cited by Petitioners show that there is no conflict between those decisions and the decision of the Fifth Circuit below.

A. FIRST CIRCUIT

Grace Bible Fellowship, Inc. v. Maine School Admin. Dist. #5, 941 F.2d 45 (1st Cir. 1991). Here, the School District maintained a complete prohibition of religious uses of its facilities notwithstanding the fact that it allowed virtually unlimited expressive activities by outside groups to be conducted at its facilities, as long as those groups were not religious or were not conveying religious messages. Here, as specifically noted in the Fifth Circuit's *Per Curiam* opinion, Respondent's facilities use policy did not bar religious groups from utilizing its facilities for the purposes of disseminating religious messages.

Contrasting Respondent's facilities use policy to the policy at issue before this Court in *Good News Club v. Milford Central School*, 202 F.3d 502 (2d Cir. 2000), *cert. granted*, 121 S. Ct. 296, the Fifth Circuit stated below:

> The Milford policy provides that "School premises shall not be used . . . for religious purposes." There is a powerful argument that

> such a prohibition against the use of facilities for a religious *purpose* is facially invalid as inevitably presenting viewpoint discrimination.
>
> This sharply contrasts with St. Tammany Parish's prohibition of a religious service. The purpose of the speaker is not the inquiry in St. Tammany Parish. Nor does it present the question of religious instruction. In St. Tammany Parish the request was to "worship the Lord in prayer and music . . .", as we have explained. (Petitioners' Appendix D, p. 39A)

The Fifth Circuit's opinion, acknowledging that once a limited public forum is created by a school district, that district may not completely prohibit the use of its facilities by religious groups seeking to disseminate religious messages, is consistent with the First Circuit's holding in *Grace Bible*.

B. THIRD CIRCUIT

Gregoire v. Centennial School Dist., 907 F.2d 1366 (3d Cir. 1990), *cert. denied*, 498 U.S. 899 (1990). In *Gregoire*, the Court also confronted a situation where the school district instituted a complete ban on religious uses and the distribution of religious literature at its facilities, notwithstanding the fact that the district had created what the Court described as a "designated open forum". The Court found that the school district had opened its facilities to "politically active" groups and "profit making ventures" while exercising a complete ban on religious uses. In its *Per Curiam* decision, the Fifth Circuit acknowledged that such a complete ban would be unconstitutional. Respondent's policy does not incorporate such a ban.

C. FOURTH CIRCUIT

Fairfax Covenant Church v. Fairfax County School Board, 17 F.3d 703 (4th Cir.), *cert. denied*, 511 U.S. 1143 (1994). There, the School District had created an open public forum, indiscriminately renting its facilities to any group that desired such a use. Subsequently, the district instituted a rental rate schedule which charged proportionately higher rental rates to religious groups than it did to secular groups. Not only are these facts inapposite to the facts at hand, because the Fourth Circuit was faced with an open public forum, there is nothing within the Fifth Circuit opinions that conflicts with the holding in *Fairfax Covenant*.

D. SEVENTH CIRCUIT

Grossbaum v. Indianapolis-Marion County Building Auth., 63 F.3d 581 (7th Cir. 1995). There, a city-county building maintained an open public lobby. For an extended period until 1993, the city-county allowed the presentation of religious displays, including a menorah within the lobby. The city-county, in response to complaints, enacted a policy prohibiting religious displays, but said policy did not prohibit other non-religious symbols and messages from being displayed. A complete ban was not even at issue before the Fifth Circuit below. Indeed the Fifth Circuit acknowledged that a complete ban of religious activity would be unconstitutional under the facts before it.

Hedges v. Wauconda Community Unit School Dist. No. 118, 9 F.2d 1295 (7th Cir. 1993). In *Hedges*, the facilities use policy forbade the distribution of any religious materials on school premises, while other secular materials, as long as they were neither obscene or libelous, could be distributed.

For reasons stated above, such a policy would not have survived the Fifth Circuit analysis where it found Respondent's policy to be constitutional.

Muller v. Jefferson Lighthouse School, 98 F.3d 1530 (7th Cir. 1996). In *Muller*, the Court upheld restrictions on student distribution of literature. Nothing within the *Muller* decision conflicts with the decision of the Fifth Circuit.

E. EIGHTH CIRCUIT

Good News/Good Sports Club v. School District of City of Ladue, 28 F.3d 1501 (8th Cir. 1994), *cert. denied*, 515 U.S. 1173 (1995). In *Good News*, the school district amended its earlier facilities use policy which allowed religion based youth groups to utilize its facilities during certain periods of the day, and enacted a policy barring the use by such groups during certain periods of the day when scouting groups were allowed to use the facilities. Additionally, the scouting groups were prohibited from including any religious speech or activity within their meetings. Nothing within the Fifth Circuit's opinion can be cited to support the amended school use policy, which the Eighth Circuit found to be unconstitutional. Rather, the prohibition in *Good News* is more akin to that currently before the Court in *Good News Club v. Milford Central School*, U.S. No. 99-2036, which the Fifth Circuit correctly distinguished from Respondent's policy.

In citing the foregoing cases to this Court as examples of conflicts between the Fifth Circuit's opinion and other circuits, Petitioners confuse the distinction between any type of religious uses and religious worship and instruction. Respondent's policy did not prohibit any religious uses of

its facilities. Indeed, religious groups are allowed to utilize the facilities to discuss and disseminate religious material or material which contains a religious viewpoint. What the Fifth Circuit correctly concluded was that Respondent's policy constitutionally disallowed the use of its facilities for the religious worship services that Petitioners admittedly requested. The decisions cited by Petitioners do not conflict with this finding.[2]

II. THE FIFTH CIRCUIT CORRECTLY CONCLUDED THAT RESPONDENT'S FACILITIES CONSTITUTE LIMITED PUBLIC FORA

Petitioners correctly point out that in its original opinion, the Fifth Circuit held that Respondent established a non-public forum by its facilities use policy. However, In its *Per Curiam* opinion, entered subsequently in response to Petitioners' Petition for Rehearing *En Banc*, the Fifth Circuit elaborated on its earlier decision and concluded that Respondent had created a limited public forum. In *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37,

2. Petitioners' citation of *Wallace v. Washoe County School Distr.*, 818 F. Supp. 1346 (D. Nev. 1991) does not avail their position. In *Wallace*, the school district allowed a wide variety of civic and political groups to rent their facilities. The only groups that were prohibited from renting the facilities were religious groups. As noted by the Fifth Circuit below, St. Tammany's policy specifically restricted its facilities from the following uses: partisan political activity, for profit fund raising and religious services. Contrary to the school district in *Wallace*, Respondent did not create an open forum. *Verbena United Methodist Church v. Chilton County Board of Educ.*, 765 F. Supp. 704 (M.D. Ala. 1991) is equally unavailing. There, the school district designated its facilities as public forums and the Court specifically found that the facilities did not constitute limited public forums, such as Respondent's facilities.

103 S. Ct. 948, this Court held that a designated public forum "may be so designated for restricted or limited uses or for a limited class of speakers." *Id.* at 46 n.7. This subcategory of the designated public forum has become known as the "limited public forum" and has been widely recognized and accepted by both this Court and the Fifth Circuit.[3]

In a "limited public forum" a state may designate a forum as public but limit the expressive activity to certain kinds of speakers or to discussion of certain subjects. *Rosenberger*, 515 U.S. at 829, 115 S. Ct. 2510 ("the necessities of confining a forum to the limited and legitimate purposes for which it was created justify the state in reserving it for certain groups or for the discussion of certain topics."); *Perry*, 460 U.S. at 49, 103 S. Ct. 948 ("implicit in the concept of non-public forum is the right to make distinctions in access based on the basis of the subject matter and speaker identity."). Such content based limitations are permissible to the extent that they preserve the purposes of the limited forum and are viewpoint neutral. *Rosenberger*, 515 U.S. at 829-30, 115 S. Ct. 2510; *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 393, 113 S. Ct. 2141, 2147 (1993).

Contrary to the arguments of Petitioners, Respondent's facilities have not, by policy or practice, become open to indiscriminate use by the general public. As established

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3. *See Rosenberger v. Rectors and Visitors of Univ. of Va.*, 515 U.S. 819, 829, 115 S. Ct. 2510 (1995); *Doe v. Santa Fe Independent School Dist.*, 168 F.3d 806 (5th Cir. 1999); *Estiverne v. Louisiana State Bar Ass'n*, 863 F.2d 371 (5th Cir. 1989); *Texas State Teachers Association v. Garland Independent Schools*, 777 F.2d 1046 (5th Cir. 1985); *Gay Student Services v. Texas A&M University*, 737 F.2d 1317 (5th Cir. 1984).

below, Respondent's facilities were overwhelmingly used by groups for activities of interest to students or parents. Well over half of the uses reported in the record were affirmatively described as sports, dance or music recitals or scouting events. The record also indicated that almost seventy-five percent of all uses were for activities directly related to students, including PTA meetings, standardized tests and graduations. This Court recognized that such uses did not transform school facilities into public forums:

> We can only conclude that the schools do allow some outside organizations such as the YMCA, Cub Scouts, and other civic and church organizations to use the facilities. This type of selective access does not transform government property into a public forum. . . . Moreover, even if we assume that by granting access to the Cub Scouts, YMCAs, and parochial schools, the school district has created a "limited" public forum, the constitutional right of access would in any event extend only to other entities of a similar character. While the school mail facilities thus might be a forum generally open for use by the Girl Scouts, the local Boys' Club, and other organizations that engage in activities of interest and educational relevance to students, they would not as a consequence be open to an organization such as PLEA, which is concerned with the terms and conditions of teacher employment.

Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 47-48, 103 S. Ct. 948 (1983).

In conclusion, the Fifth Circuit determined that Respondent had created a limited public forum. Consequently, Respondent was constitutionally permitted to prohibit outside, non-student groups from using their facilities to conduct religious worship services and instruction, just as they were constitutionally permitted to prohibit partisan political activity and for profit fund raising events. Because Respondent's facilities are not public fora, the facilities' uses may be so limited.[4]

III. RESPONDENT'S POLICY DOES NOT VIOLATE THE FREE SPEECH CLAUSE

Respondent does not prohibit religious speech at its facilities. Petitioners erroneously equate Respondent's denial of their request for a religious worship service to an absolute prohibition of religious speech. The use of school facilities by outside organizations or groups outside school hours for the purpose of discussing religious material or material which contains a religious viewpoint or for distributing such material is permissible. It is only religious worship and instruction that is barred as to all outside, non-student groups, not just Petitioners. This is consistent with this Court's ruling that religious organizations do not "enjoy rights to communicate . . . superior to those of other organizations having social, political or ideological messages to proselytize." *Heffron v. International Society Krishna Consciousness, Inc.*, 452 U.S. 640, 652-53, 101 S. Ct. 2559 (1981).

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4. By allowing the outside groups to discuss and disseminate materials containing a religious viewpoint, Respondent has complied with this Court's teachings in *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 393, 113 S. Ct. 2141, 2147 (1993).

IV. RESPONDENT'S POLICY DOES NOT VIOLATE THE FREE EXERCISE CLAUSE

Petitioners erroneously suggest that Respondent's facilities use policy violates the free exercise clause. To the contrary, Respondent's facilities use policy is both neutral and of general application. Accordingly, this policy need not be justified by a compelling governmental interest. *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 110 S. Ct. 1595 (1990). Here, Respondent's policy does not target the Christian Coalition in its attempt to exercise its religion. Rather, Respondent's policy prohibits religious worship services by all outside, non-student groups. The policy does not disfavor one religion over another, and is generally applicable to any outside non-student groups that wish to conduct worship services at Respondent's facilities.

Under the Respondent's policy, no outside, non-student group may conduct a worship service on Respondent's premises. Whether this worship service is described as religious, as opposed to "satanic" or "pagan", is irrelevant. The prohibition applies equally, neutrally and generally to all forms of worship services. Consequently, Respondent's policy does not violate the free exercise clause.

Similarly, Respondent's policy does not violate the free exercise clause merely because it prohibits "religious" instruction. As the Fifth Circuit illustrated in its opinion below, Respondent's policy is fairly read to speak to worship services. The policy follows its prohibition of religious instruction with an explicit statement that "discussing religious material or material which contains a religious viewpoint" is permitted. Consequently, Respondent's policy

does not bar instructing on an issue from a religious viewpoint. Rather, the policy bars religious instruction as part of a religious worship service.

V. RESPONDENT'S POLICY DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE

Respondent's policy clearly demonstrates neutrality as opposed to hostility towards religion. Consequently, Respondent's policy does not violate the establishment clause. *Board of Education v. Mergens*, 496 U.S. 226 (1990). It was undisputed below that Respondent allowed student or youth organizations, such as the Generation Acts and the Fellowship of Christian Athletes, access to its facilities during non-instructional time for the purposes of engaging in religious speech in compliance with the Equal Access Act, 20 U.S.C. § 4071, *et seq.* However, with regard to outside, non-student groups, the Board's policy not only prohibits religious worship services, but also prohibits partisan political activity and for profit fund raising. A policy that allows discussion of religious materials or materials which contain a religious viewpoint, including the distribution of such material, cannot reasonably be seen as hostile towards religion. Rather, the exclusion of a Christian worship service, is just as neutral as the exclusion of a satanic or pagan worship service, regardless of whether the word "religious" is used to describe either service.

Respondent's policy does not exclude private religious speech from its facilities. While the policy excludes religious worship and instruction, by outside, non-student groups, religious speech is allowed by virtue of the fact that outside non-student groups may discuss religious material or material which contains a religious viewpoint and distribute that

material on Respondent's premises. Clearly, religious speech is tolerated, and Petitioners' argument to the contrary is without merit.[5]

VI. THE FACTS OF THIS CASE ARE MATERIALLY DISTINGUISHABLE FROM THOSE IN *GOOD NEWS CLUB v. MILFORD CENTRAL SCHOOL*, U.S. NO. 99-2036. ACCORDINGLY, THIS COURT SHOULD NOT HOLD THIS PETITION PENDING THE DISPOSITION OF SAID CASE.

Petitioners suggest that this Court should hold this Petition pending disposition of *Good News Club v. Milford Central School*, U.S. No. 99-2036. This case, however, is materially distinguishable both in facts and law from the case at hand. The Milford policy provides that "school premises shall not be used . . . for religious purposes." This blanket prohibition against use of school premises for religious purposes is starkly different than Respondent's policy, which simply prohibits religious worship and instruction. Respondent's policy does not restrict any and all religious activity, including the discussion of subjects from a religious viewpoint. Consequently, *Good News* is distinguishable from the facts at hand.

Moreover, the group at issue in *Good News* was a student youth organization that had a religious character. Here, Respondent's policy would not prohibit such a group from utilizing its premises. Indeed, Respondent has allowed such

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5. *Widmar v. Vincent*, 454 U.S. 263, 102 S. Ct. 269 (1981) is not applicable. There the Court found a university to be an open public forum, in contrast to the present case where Petitioners sought use of an elementary school in a limited public forum.

uses with regard to student groups such as Generation Acts and the Fellowship of Christian Athletes. For these reasons, the issues presented in this Petition for Writ of Certiorari are clearly distinguishable from those considered by the Court in *Good News*. Accordingly, we respectfully submit that the Court should not hold this Petition pending disposition of the *Good News* matter.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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